89-115

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1989

JOHN A. SCHEXNIDER
AND ALLISON SCHEXNIDER
Petitioners

versus

McDERMOTT INTERNATIONAL, INC.,
McDERMOTT, INC.
and INSURANCE COMPANY OF NORTH AMERICA
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NO. 81-2358

JOHN A. SCHEXNIDER

VS.

McDERMOTT INTERNATIONAL, INC.,
and McDERMOTT, INC.

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
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VERON, J.

RULING UPON DEFENDANTS' MOTION TO DISMISS

This matter is before the Court upon the motion of defendants to dismiss the plaintiff's cause of action upon the grounds of plaintiff's failure to state a cause of action upon which relief can be granted and upon the grounds of forum non conveniens. Because the Court has carefully considered matters outside of the pleadings, the motion shall be treated as one for summary judgment pursuant to Rule 56(c). *Chirinos de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240, 1244 (3d Cir. 1980); Fed R. Civ. Pro. 12(b); *see Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 860 (5th Cir. 1983). In considering the motion pursuant to Rule 56, the Court has considered all of the facts and the inferences to be drawn therefrom in a light most favorable to the plaintiff.

I. FACTS

Plaintiff John A. Schexnider is an American citizen who alleges injury while serving as a crewmember of the Derrick Barge 21 ["DB 21"] on April 12, 1981, while performing work in the Java Sea off the coast of Indonesia. At the time of his accident, plaintiff was working pursuant to an employment contract with McDermott, International, Inc., a Panamanian corporation, which had been entered into in New Orleans, Louisiana on March 6, 1981 and which called for plaintiff to work "in the Southeast Asia Area."

During the plaintiff's service aboard the DB 21, the vessel flew the flag of Australia. The DB 21 was originally built in Australia, had been purchased by McDermott Australia, Ltd. in 1966, and had been refitted for use in Indonesian waters. At no time has the DB 21 ever been within the territorial waters of the United States. At the time of the accident, the DB 21 was owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia, Pte., Ltd., both of which are foreign corporations not conducting any business within the United States although they are wholly owned subsidiaries of McDermott International, Inc. and McDermott, Inc., respectively. After perceiving the correct posture of the parties, plaintiff moved to amend his complaint in order to name McDermott Australia, Ltd., and McDermott Southeast Asia, Pte., Ltd., as party defendants, but they recently have been dismissed pursuant to Rule 4(j)[1].

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1. Fed. R. Civ. Pro. 4(j) provides:

> (j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action *shall be* dismissed as to

II. APPLICABLE LAW

A. Standard of Review

In determining the merits of defendants' motion to dismiss pursuant to the doctrine of forum non conveniens, this Court must first ascertain whether American or foreign law governs the lawsuit. If foreign law applies and the foreign forum is accessible, the Court must then determine in which forum the case should be tried. A finding that the lawsuit should be tried in the foreign forum warrants dismissal because the Court should decline to exercise jurisdiction over the dispute. *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384, *reh. denied* 710 F.2d 207 (5th Cir. 1983).

B. Choice of Law

It is well established that this Court is to rely upon the eight *Lauritzen-Rhoditis* factors developed by the Supreme Court in making it initial determination of whether United States or foreign law applies. *See Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97

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1. (Continued)

> that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule. (Emphasis added.)

Because plaintiff failed to serve these two foreign corporations within the time period prescribed by this rule, they have been dismissed as party defendants. Counsel for defendants maintains that plaintiff was unable to obtain proper service on these corporations, *ab initio*, since they have no minimum contacts with the United States.

L.Ed. 1254 (1953). The eight factors specified in *Lauritzen-Rhoditis* are: (1) the place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured seaman; (4) allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the accessibility of a foreign forum; (7) the law of that forum; (8) the shipowner's base of operation.

In the case at bar, several of the *Lauritzen-Rhoditis* factors are easily decided in favor of foreign law.[2]

1. Place of the Wrongful Act - - -

At the time of plaintiff's injury, the ship was located in the Java Sea off of the coast of Indonesia. While the Supreme Court in *Lauritzen* noted that the test of location of the wrongful act is of limited application to shipboard torts because of the varieties of legal authority over waters the ship may navigate, 345 U.S. at 583, 73 S.Ct. at 929, it is highly significant that the ship on which the injury occurred has *never* navigated the territorial waters of the United States. *See Fajardo, supra*, 707 F.2d at 861. Thus, the locality test affords no support whatsoever for the application of American law in this case. Moreover, insofar as a portion of plaintiff's unseaworthiness claim relates to the angle at which a staircase was built on the DB 21, it would be appropriate to apply the law of state where the DB 21 was constructed - - - Australia.

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2. It is well established that the *Lauritzen-Rhoditis* factors are applicable in determining jurisdiction of claims asserted under the General Maritime Law of the United States as well as under the Jones Act. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 381-84, 79 S.Ct. 468, 485-86, 3 L.Ed.2d 368 (1959); *Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 861 (5th Cir. 1983).

2. **Law of the Flag - - -**

The flag of the vessel aboard which the plaintiff was injured flew the flag of the country which spirited the America's Cup away from Newport, Rhode Island in 1983. Contrary to the plaintiff's assertion that the Australian flag was merely a "flag of convenience," the evidence illustrates that the ship was built according to Australian regulations and was owned by an Australian corporation.[3] The Supreme Court has recognized that the law of the flag is "the most venerable and universal rule of maritime law," which "overbears most other connecting events in determining applicable law ... unless some heavy counterweight appears." *Lauritzen*, 345 U.S. at 584, 585-86, 73 S.Ct. at 929-30; *Rhoditis, supra*, 398 U.S. at 313, 90 S.Ct. at 1736 (Harlan, J., dissenting). As appears from the facts of this case, there are no such counterweights which favor the application of American law.

3. **Allegiance or Domicile of the Injured Seaman - - -**

The United States has an interest in seeing that its citizens not be maimed or disabled from self-support, and in seeing that its citizens who work abroad are adequately protected. It is also true that a seaman takes his employment where he can find it, and as the foreign Australian forum is presumed capable of providing plaintiff a remedy for any wrong suffered, this interest will be adequately served.

4. **Allegiance of the Defendant Shipowner - - -**

The owner of the DB 21 is McDermott Australia, Ltd., an Australian corporation which exercises local control over the operations of its ships. Obviously, this factor supports the application of Australian law.

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3. I.e., McDermott Australia, Ltd.

5. **Place of Contract - - -**

Plaintiff entered into his employment contract with defendant McDermott International, Inc., a Panamanian corporation, in New Orleans. The contract specifically provides, however, that the employment is to be in "the Southeast Asia Area." The Supreme Court has observed that the place of contracting for employment as a seaman is generally fortuitous. Moreover, as the Supreme Court has observed:

> The practical effect of making the *lex loci contractus* govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hiring in ports of countries that take best care of their seaman. *Lauritzen, supra*, 345 U.S. at 588, 73 S.Ct. at 931.

In this instance, the plaintiff specifically contemplated working in Southeast Asia at the time he entered the contract, and it will certainly not be contrary to the expectation of the parties to find that the law of a country in that part of the world will govern plaintiff's claims.

6. **Inacessibility of Foreign Forum - - -**

The parties do not dispute that Australian courts are available to provide the plaintiff an adequate legal remedy.

7. **The Law of the Australian Forum - - -**

The Fifth Circuit has consistently recognized that the law of a foreign forum is to be presumed adequate, "unless

the plaintiff makes some showing to the contrary, or unless conditions in the forum otherwise made known to the court, plainly demonstrate that the plaintiff [] [is] highly unlikely to obtain basic justice therein." *Vaz Borralho, supra*, 696 F.2d at 393-94; *see also McClelland Engineers, Inc. v. Munusamy*, 784 F.2d 1313, 1319 (5th Cir. 1986). Plaintiff has made no such showing in this case.

8. **Shipowner's Base of Operations - - -**

While the DB 21 is owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia, Pte., Ltd. at the time of plaintiff's injury, plaintiff urges the Court to "look through the facade of foreign incorporation to the ownership behind" McDermott Australia, Ltd. *See Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028, 1032 (5th Cir. 1984). As discussed above, McDermott Australia, Ltd., the Australian corporation which owned the vessel, as well as McDermott Southeast Asia, Pte., Ltd., the Singaporean corporation which had chartered the vessel to perform work in laying a pipeline in the Java Sea, are wholly owned subsidiaries of McDermott International, Inc., which is a Panamanian corporation. In turn, McDermott International, Inc. is a wholly owned subsidiary of McDermott, Inc., an American corporation. Because the ultimate parent corporation, defendant McDermott, Inc., is American, the plaintiff contends that the shipowner's real base of operations is the United States. Plaintiff furthermore points out that the vessel is surveyed by a marine equipment coordinator employed by McDermott, Inc. who maintains his office in New Orleans. In addition, plaintiff contends that because the defendant, Insurance Company of North America ["INA"] insures all McDermott corporations and subsidiaries, and because INA is an American corporation, that there is further justification for finding an American base of operations.

Defendants, on the other hand, cite deposition testimony which clearly shows that the day-to-day operation of the DB 21 was controlled locally, i.e., by the charterer McDermott Southeast Asia, Pte., Ltd., and, to a lessor extent, the vessel owner McDermott Australia, Ltd. Furthermore, whenever the McDermott, Inc. marine equipment coordinator went to supervise the operation of the DB 21, he would be paid by McDermott Australia, Ltd. for his work just as an outside company would be paid. Deposition of Walter Hazard, p.p. 56-58.

The crux of this determination "involves the ascertainment of the facts or groups of facts which constitute contacts between the transactions involved in the case and the United States, and then deciding whether or not they are substantial." *Rhoditis, supra*, 398 U.S. at 309, n.4, 90 S.Ct. at 1734, n.4, *quoting with approval Bartholomew v. Universe Tank Ships, Inc.*, 263 F.2d 437, 441 (2d Cir.), *cert. denied* 359 U.S. 1000, 79 S.Ct. 1138, 3 L.Ed.2d 1030 (1959). It is clear from the facts of the case that the operational activities of the DB 21 on the date of the plaintiff's injury had no contacts whatsoever with the United States. The vessel was originally constructed in Australia in accordance with Australian Government regulations, it flew the Australian flag, it was owned by an Australian Company, and it was chartered to a Singaporean company which oversaw its day-to-day operations in the Java Sea off Indonesia.

In order to find an American base of operations, "[t]he necessary operational contacts with the United States must relate to both the shipowner *and the ship* . . . and must be substantial." *Sosa, supra*, 736 F.2d at 1032 (emphasis added; citations omitted). Obviously, there are no substantial contacts with the United States, and the Court thus finds that the shipowner's base of operations is Australia. *Cf. Sosa, id.* at 1031 (where "many of the wrongful acts took place in the United States and this weigh[ed] in favor of applying American law").

The Court furthermore rejects as without merit the plaintiff's contention that the fact the Insurance Company of North America insures the Australian subsidiaries as well as other McDermott companies makes the shipowner's contacts with the United States "substantial." There is no authority whatsoever for this proposition and the Court furthermore notes that there is nothing within the law of admiralty which authorizes a direct action against a shipowner's insurer. *Cf. Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir. 1986) (holding that a direct action may be maintained against an insurer if the law of the forum state so allows, but furthermore recognizing that federal admiralty law confers no general right to sue an insurance company directly).

While the Supreme Court has recognized that the *Lauritzen-Rhoditis* factors may not be applied in a purely mechanical fashion, it is clear from a consideration of all of the facts of the case that no substantial nexus exists between the present forum and the case at bar. The most significant contacts lie in the "Land Down Under," and Australian law therefore governs the controversy.

C. Forum Non Conveniens

Having determined that Australian law applies to this action, the Court next considers whether those factors set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1947), favor dismissal or retention of the case. One factor in favor of retaining jurisdiction is that the plaintiff has already deposed particular witnesses in Singapore who would not be available to compulsory process within this Court's jurisdiction. On the other hand, the Court notes that they would most likely not be subject to any compulsory process of Australian courts either. Another consideration is that plaintiff is a resident of The Western District of Louisiana–Lake Charles Division and has undergone medical

treatment in the local area. While plaintiff contends that his liability experts are residents of the United States, this argument is premised upon the erroneous assumption that American law will govern the controversy. The Court has also considered the age to which this case has grown before the Court, but specifically notes that this has been due not only to its overly congested docket but also because of requested trial continuances by counsel for the plaintiff.

Factors weighing in favor of dismissal include the complex and difficult task faced by this Court in finding and applying Australian law to the instant controversy. Following this Court's preliminary determination that Australian law would govern this case, it invited counsel to its chambers for a status conference at which time plaintiff's counsel was admonished that he faced potential dismissal of his entire suit pursuant to Rule 12(b)(6) because he had not asserted any cause of action arising under Australian law. *See Vaz Borralho, supra*, 696 F.2d at 390-91 (5th Cir. 1983); *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015, 1020 n.7, *reh denied* 659 F.2d 1075 (5th Cir. 1981), *cert. denied* 445 U.S. 1019, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982). Rather than allege any specific cause of action arising under Australian law, however, plaintiff instead chose to amend his complaint so as to read: "In the alternative, the plaintiffs allege that if the law of the United States is not applicable to the accident of April 12, 1981, that the law of Australia and/or Indonesia and/or Singapore is applicable in all respects." Plaintiff has provided no indication whatsoever as to any specific cause of action which he may have under Australian law and this Court currently sits without an inkling as to the content of the law which it will be required to apply. In this vein, the Court has no idea whether or not plaintiff is entitled to a jury trial and it sits in the dark as to how the matter should proceed under the governing Australian law.

Another significant factor favoring dismissal is the unavailability of any remedy which the plaintiff may have against McDermott Southeast Asia, Pte., Ltd. and/or McDermott Australia, Ltd. in this court. As previously noted, the plaintiff was unable to secure service upon those companies within the time period prescribed by Federal Rule of Civil Procedure 4(j) and his action against them consequently has been dismissed without prejudice. Certainly, McDermott Australia, Ltd. is subject to the jurisdiction of Australian courts and it has furthermore been represented that McDermott Southeast Asia, Pte., Ltd., having entered into the DB 21 charterparty with McDermott Australia, Ltd., would have the requisite minimal contacts with Australia to be subject to its jurisdiction. Certainly, the absence of the vessel owner and charterer from the lawsuit is a highly significant consideration, and serves to strongly tip the scale in favor of dismissal.

Factors of public interest also favor dismissal of the action. As noted by the Supreme Court in *Gilbert*: "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin." *Gilbert, supra*, 330 U.S. at 508, 67 S.Ct. at 843. Certainly, plaintiff's action cannot be said to have originated in the Western District of Louisiana. Moreover, the plaintiff seeks a trial by jury and, while the Court is unsure of whether he would be entitled to one under Australian law, this Federal District Court has been directed by the Administrative Office of the United States Courts that all civil jury trials must be suspended through the end of the fiscal year or until additional funds are made available, as a result of, inter alia, the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act. In addition, there is no way in which this case could be considered to be "a localized controversy" in which the citizens of the community would have any interests whatsoever. As such, the Court finds that the *Gilbert* factors strongly favor dismissal of the action.

Accordingly the Court determines that dismissal on the grounds of forum non conveniens is warranted, provided that the defendants: (1) agree to submit to the jurisdiction of Australian Courts and submit to service of process in an appropriate Australian court within sixty (60) days of the date of this order; (2) agree to wave all statute of limitations and laches defenses; (3) agree to satisfy any judgment rendered by the Australian courts; and (4) agree that any and all depositions taken in the present matter shall be admissable as evidence for consideration by the Australian court should defendants fail to meet any of these conditions, this Court will resume jurisdiction over the case.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 23rd day of June, 1986.

s/s Earl E. Vernon
EARL E. VERNON
UNITED STATES DISTRICT JUDGE

APPENDIX B

John A. SCHEXNIDER,
Plaintiff-Appellant,

v.

McDERMOTT INTERNATIONAL, INC., et al
Defendants-Appellees.

No. 86-4506.

United States Court of Appeals,
Fifth Circuit.

May 29, 1987.

Rehearing and Rehearing En Banc
Denied July 15, 1987.

American seaman brought action against Australian shipowner and charterer for injuries sustained on board ship. The United States District Court for the Western District of Louisiana, Earl E. Veron, J., dismissed suit, and seaman appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) Australian law, and not American law, applied where law of flag was Australian, ship was built in Australia according to Australian standards, and Australian courts and law were available to provide relief, and (2) dismissal on forum non conveniens grounds was abuse of discretion where trial in Australia would be hardship to seaman, and Australian defendants were ready and able to have case tried in Louisiana.

Affirmed in part, reversed in part and remanded.

1. **Federal Courts KEY 776**

District court's choice-of-law determination is subject to de novo review by Court of Appeals.

2. **Federal Courts KEY 45, 818**

District court's forum non conveniens determination is committed to sound discretion of district court, and may be reversed only if district court's decision constitutes clear abuse of discretion.

3. **Seamen KEY 3**

Australian law, and not American law, applied to American seaman's maritime action against Australian shipowner and charterer, even though employment contract was made in United States, where ship on which accident occurred flew Australian flag, Australian courts were accessible to provide relief, and ship was built in Australia in accordance with Australian standards.

4. **Federal Courts KEY 105**

There is ordinarily strong presumption in favor of plaintiff's choice of forum that may be overcome only when private and public interest factors clearly point towards trial in alternative forum.

5. **Federal Courts KEY 45**

Dismissal of American seaman's maritime claim against Australian shipowner on forum non conveniens grounds was abuse of discretion, even if court would have difficulty determining applicable Australian law, where trial in Australia would be hardship to seaman, shipowner was ready and able to try case in Louisiana, and extensive pretrial discovery and proceedings had already taken place over five-year period.

6. **Federal Courts KEY 45**

Need to apply foreign law is not in itself reason to apply doctrine of forum non conveniens.

Joseph J. Weigand, Jr., Houma, La., for plaintiff-appellant.

James B. Doyle, Henry E. Yoes, III and Edmund E. Woodley, Lake Charles, La., for defendants-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ, JOLLY and HIGGINBOTHAM, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

John Schexnider appeals from the district court's dismissal of his suit against the appellees on *forum non conveniens* grounds. Although we agree with the district court that Australian rather than United States law governs this maritime action, we conclude that the district court did not act within its discretion when it dismissed Schexnider's suit for *forum non conveniens* reasons.

I

The appellant, John A. Schexnider, is an American citizen. He alleges an injury, occurring on April 12, 1981, while serving as a crewmember of the Derrick Barge 21 (DB), which was performing work in the Java Sea off the coast of Indonesia. At the time of his accident, Schexnider was working pursuant to an employment contract with McDermott International, Inc., a Panamanian corporation.

On March 6, 1981, in New Orleans, Schexnider had entered into the contract that called for him to work "in the Southeast Asia Area."

During Schexnider's service aboard the DB, the vessel flew the Australian flag. The DB was built in Australia, had been purchased by McDermott Australia, Ltd. in 1966, and had been refitted for use in Indonesian waters. At no time had the DB ever been within the territorial waters of the United States. At the time of the accident the DB was owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia, Pte., Ltd., both of which are foreign corporations not conducting any business within the United States, although they are wholly owned subsidiaries of McDermott International Inc., and McDermott, Inc. (both U.S. corporations), respectively. After perceiving the correct posture of the parties, Schexnider moved to amend his complaint in order to name McDermott Australia, Ltd., and McDermott Southeast Asia, Pte., Ltd., as party defendants, but they were dismissed pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.

II

On December 28, 1981, Schexnider filed his seaman's complaint against McDermott International, Inc., and McDermott, Inc., (McDermott) pursuant to the Merchant Marine Act of 1920, 46 U.S.C. § 688, better known as the Jones Act, and general maritime law, Schexnider alleged that he was injured in a slip and fall accident on April 12, 1981, while working on the DB. In its answer McDermott admitted ownership of the DB. On June 18, 1982 Schexnider filed an amended complaint to add his wife as a plaintiff.

Pretrial proceedings and discovery followed. A trial date was set on several occasions but in each instance the trial was postponed. In April 1986, the defendants moved to dismiss on choice-of-law and *forum non conveniens* grounds. This

motion was granted by the district court in an opinion dated June 23. The court found that Australian law governed the case, and dismissed the case as to the remaining defendants, conditioned upon the defendants agreeing to submit to the jurisdiction of Australian courts and its service of process within sixty days of the date of the order, agreeing to waive all statute-of-limitations and laches defenses, agreeing to satisfy any judgment rendered by the Australian courts and agreeing that any and all depositions taken in the present matter would be admissible as evidence in the Australian courts.

By pleading of July 7, 1986, McDermott, Inc., McDermott International, Inc. and INA agreed to the terms and conditions specified in the judgment. Schexnider filed a motion to stay and a notice of appeal on July 17.

III

[1, 2] Resolution of this appeal requires us to determine whether the district court abused its discretion by dismissing Schexnider's suit on *forum non conveniens* grounds. First the court determines that United States law does not apply, and then the court balances public and private convenience factors set forth in judicial precedent to determine whether to dismiss the case. While the district court's choice-of-law determination is subject to *de novo* review by the court of appeals, *Bailey v. Dolphin International, Inc.*, 697 F.2d 1268, 1274 (5th Cir. 1983), the *forum non conveniens* determination (i.e., the balancing of public and private factors) is committed to the sound discretion of the district court. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981). We may reverse a district court's decision on a motion to dismiss based on *forum non conveniens* only if its action constitutes a clear abuse of discretion. *Piper*, 454 U.S. at 257, 102 S.Ct. at 266-67; *Bailey*, 697 F.2d at 1274.

[3] The district court correctly determined that Australian law applied to Schexnider's suit. The determination of the law governing this maritime action is made pursuant to a multifactored analysis set out in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), and further elaborated in *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) (these factors have become known as the *Lauritzen-Rhoditis* factors). They are:

1. the place of the wrongful act;

2. the law of the flag;

3. the allegiance or domicile of the injured seaman;

4. the allegiance of the defendant shipowner;

5. the place where the contract was made;

6. the accessibility of the foreign forum;

7. the law of the forum;

8. the base of operations.

See Rhoditis, 398 U.S. at 308-09, 90 S.Ct. at 1733-34. The significance of these factors must be considered in the light of the national interest to be served by assertion of Jones Act jurisdiction. *Id.* at 309, 90 S.Ct. at 1734. In this case, the district court concluded that the application of these factors weighed in favor of applying Australian law. While the court found that the domicile of the injured party was in the United States, and his employment contract was made in the United States, the other factors favored applying Australian law. The district court found that the ship on

which the accident occured flew the Australian flag, the allegiance of the defendant shipowner was Australian, Australian courts were accessible to provide relief, Australian law was presumed adequate since the plaintiff had not shown otherwise, and the shipowner's base of operations was abroad. The district court also found that the ship was never intended to and never did sail in American waters, and that while the plaintiff did sign on for work in this country, the employment contract specifically provided that employment was for the "Southeast Asia area."

Of particular significance in this case is the fact that the ship on which Schexnider was injured flew the Australian flag. The law of the flag is given *great* weight in determining the law to be applied in maritime cases. As the Supreme Court has held, the law of the flag is "the most venerable and universal rule of maritime law," which "overbears most other connecting events in determining applicable law . . . unless some heavy counterweight appears." *Lauritzen*, 345 U.S. at 584, 73 S.Ct. at 929. The district court found that under the facts of this case, heavy counterweights which favored applying American law did not exist. We agree.

Furthermore, a related consideration is that the DB was built in Australia, and in accordance with Australian standards. This clearly favors the application of Australian law since part of Schexnider's unseaworthiness claim relates to the way in which the staircase was built on the DB. In addition, the district court presumed, without challenge, that the Australian courts would be available and adequate for the litigation of this case. The principal factor favoring the application of American law is the fact that Schexnider is a United States citizen. But this is not sufficient to outweigh the factors favoring the application of Australian law, especially the law of the flag. Schexnider also argues that the fact that the ultimate parent corporation (the DB is owned by a subsidiary of subsidiary), McDermott, Inc., is an

American corporation, militates in favor of applying American law. But we do not regard as significant the fact that McDermott, Inc. is an American corporation given the fact that the day-to-day operations of the vessel were, according to the district court, controlled by McDermott's Southeast Asian and Australian subsidiaries.

The preponderance of the *Lauritzen-Rhonditis* factors clearly favors the application of Australian law. First, and perhaps most important, the law of the flag is Australian. Furthermore, the DB was built in Australia according to Australian standards, the day-to-day operations of the DB were governed in part by an Australian subsidiary of McDermott, and Australian courts and law are available to provide relief. By was of contrast only the fact that Schexnider is a United States citizen clearly favors the application of American law. Given the heavy balance in favor of applying Australian law, we agree with the district court that Australian law governs Schexnider's lawsuit.

IV

We do, however, find that the district court abused its discretion when it dismissed Schexnider's suit on *forum non conveniens* grounds. The determination whether an action should be dismissed on *forum non conveniens* grounds involves a balancing of public and private interest factors as set out by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947):

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;

possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpenseive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other

> forum untangle problems in conflict of laws, and in law foreign to itself.

330 U.S. at 508-509, 67 S.Ct. at 843.

[4, 5] Although it is true that an appellate court may reverse a district court's *forum non conveniens* determination only where there has been a clear abuse of the district court's discretion, *Piper*, 454 U.S. at 257, 102 S.Ct. at 266-67, it is also true that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum that may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. *Id.* at 255, 102 S.Ct. at 265-66.[1] In this case the private and public interest factors do not point clearly toward trial in Australia.

Trial in Lake Charles, Louisiana, is clearly convenient for the plaintiff, who is a citizen and resident, especially when many of the plaintiff's witnesses are also in this country. Moreover, a trial in Australia would in all likelihood be a hardship to Schexnider who is apparently not in good health. By way of contrast, the appellees have not shown that a trial in Lake Charles would greatly inconvenience them. From the record, we observe that the appellees were apparently ready and able to have their case tried in Lake Charles. At least in a few instances, the trial date in this case was reset on Schexnider's motion, not the appellees'. We thus conclude that the private interest factors clearly point in favor of having this case tried in the United States.

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1. Schexnider makes much of the fact that he is an American citizen. A citizen's forum choice should not be given dispositive weight, however. *Piper*, 454 U.S. at 256 n. 23, 102 S.Ct. at 266 n. 23. This court has held that a court does not abuse its discretion by not heavily weighting this factor. *Pacific Employees Ins. Co. v. M/V Capt. W.D. Cargill*, 751 F.2d 801, 806 (5th Cir. 1985).

The district court concluded that factors of public interest favored trial in Australia. The district court cited "Gramm-Rudman" problems (federal court budgetary difficulties) and the lack of local interest in this type of case. The Gramm-Rudman energency, as it relates to funding of federal trials, has subsided. Lack of public interest in Schnexider's case would constitute a weightier objection if the litigation of this case were still in its preliminary stages. But extensive pretrial discovery and prodeedings have already taken place over a period of some five years. A trial date has been set several times. Given the extensive nature of the pretrial preparation, a trial in Lake Charles would not burden the district court significantly more than it has already been burdened. Although the local community will be inconvenienced by being pressed into jury duty, the imposition of jury duty is mitigated by the considerations that Schexnider is a citizen of the community and that the trial is not likely to be lengthy.

[6] The district court's principal objection to trying this case in the United States was the difficulty that would be involved in applying Australian law. Although this certainly is a factor weighing in favor of trying the case in Australia, the need to apply foreign law is not in itself reason to apply the doctrine of *forum non conveniens*. *Piper*, 454 U.S. at 260 n. 29, 102 S.Ct. at 268 n. 29; *Manu Intern. S.A. v. Avon Products, Inc.*, 641 F.2d 62, 63 (2d Cir. 1981). As the Second Circuit noted in *Manu*: "We must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform." 641 F.2d at 68.

Because the factors pointing against the strong presumption in favor of the plaintiff's choice of forum in this case are slight, we conclude that the district court abused its discretion by dismissing Schexnider's suit.

V

For the reasons discussed in this opinion, we affirm the district court's determination that Australian law applied in this case. However, we also reverse the district court's dismissal of Schexnider's suit against the appellees. This case is therefore remanded to the district court with instructions to retain jurisdiction and to apply Australian law to Schexnider's maritime claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WEST KEY NUMBER SYSTEM

APPENDIX C

John A. SCHEXNIDER and Allison Schexnider, Plaintiffs-Appellants,

v.

McDERMOTT INTERNATIONAL, INC., et al., Defendants-Appellees.

No. 88-1667

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

March 16, 1989.

American seaman brought action against Panamanian corporation to recover for injuries sustained on Australian barge chartered to corporation's subsidiary. The United States District Court for the Western District of Louisiana, Earl E. Veron, J., dismissed, and seaman appealed. The Court of Appeals, 817 F.2d 1159, affirmed in part, reversed in part, and remanded. On remand, the District Court, following bench trial, entered judgment against seaman. Seaman appealed. The Court of Appeals held that: (1) the "law of the case" required the District Court to apply Australian law on remand, and (2) finding that seaman's fall was not caused by any condition of the stairs or any other appurtenance of the barge was not clearly erroneous.

Affirmed.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ, KING, and SMITH, Circuit Judges.

PER CURIAM:

This appeal is the second time that the parties have appeared before this court. In their first visit, *see Schexnider v. McDermott Int'l, Inc.* 817 F.2d 1159 (5th Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 488, 98 L.Ed.2d 486 (1987), John A. Schexnider ("Schexnider") appealed from the district court's dismissal of his suit against McDermott International, Inc., a Panama corporation, and McDermott, Inc. on *forum non conveniens* grounds. Schexnider was partly successful, and we reversed the district court's dismissal of his suit. We affirmed, however, the district court's determination that Australian law governed Schexnider's action and remanded the case to the district court for trial.[1] Following a bench trial, the district court entered judgment in favor of the defendants.

[1,2] Schexnider appeals, arguing that the district court's findings of fact are clearly erroneous and that the district court should not have applied Australian law. Addressing the latter argument first, our earlier decision concerning this case decided the question of what law was to be applied at trial. The decision of a legal issue by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case at

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[1] On remand, the district court issued two opinions, only one of which has been published. *See Schexnider v. McDermott Int'l, Inc.*, 688 F.Supp. 234 (W.D.La.1988) (denying defendant insurance company's motion for summary judgment).

both the trial and appellate levels unless the evidence at a subsequent trial was substantially different, the controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. *See White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967). In support of his argument that the district court erred in applying Australian law, Schexnider cites no reason that was not fully considered by the panel that directed the district court to apply Australian law. We have, therefore, no basis for reversing the district court in its decision to apply Australian law.[2]

[3] We turn next to Schexnider's argument that the district court was clearly erroneous in its findings of fact relating to Schexnider's accident. Schexnider's complaint alleges that on April 23, 1981, he slipped in grease or hydraulic fluid that had been allowed to accumulate on a step of a stairway on the Derrick Barge 21 (the "barge"), on which he was employed as a storeman. At trial, the substance of Schexnider's testimony was that both the accumulated grease or hydraulic fluid and the dented treads in the center of the stairs[3] caused his accident. The district court's opinion carefully reviewed Schexnider's testimony,

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2. The relevant Australian law was established at trial through the testimony of two experts. The district court's opinion noted that "[t]he parties agree that under Australian law the basic cause of action is in ordinary common law negligence, with the plaintiff bearing the burden of proof by a preponderance of the evidence." Schexnider also alleged a cause of action for breach of an implied warranty to provide a safe place to work based on his contract of employment with McDermott International, Inc. the district court's decision with respect to causation, *infra*, obviated the necessity for deciding what law would govern such a claim and whether the claim actually lies.

3. Testimony was offered that the treads in the center of the stairs were dented, perhaps because someone had rolled something heavy down the center of the stairway.

as well as the testimony of various other witnesses to the accident itself and to the respective conditions of the barge generally and the stairway specifically. The district court found that Schexnider's method of descending the stairs——slowly, deliberately, and one stair at a time while holding the rail—was the safest method of forward descent and would minimize any possibility that the angle of the stairs and the slight indentations which existed in the treads would have caused his fall. The district court concluded that:

> The court is not persuaded that any condition of the stairs or any other appurtenance of the vessel contributed to the plaintiff's accident. Nor is the court persuaded that any foreign substance was on the stairs or played a part in causing the fall. The cause of the fall remains a puzzlement, as the court cannot discern how, after both of the plaintiff's feet were on the top step and he was, for a split second, stopped, his right foot came to fly out from under him when he stepped off with his left. The plaintiff bore the burden of proof in this action, and he has not sustained it. The court finds that no fault or condition attributable to any of the defendants or to any of INA's insureds contributed to the fall.

On appeal, Schexnider focuses on discrepancies between the deposition testimony of the chief engineer and the captain of the barge and their testimony at trial. At the trial, in Schexnider's view, these two witnesses "were repeatedly impeached with their deposition testimony and the written accident report." Schexnider argues, very simply, that "either the truth was told in the depositions or at trial." Clearly, the district court credited the testimony of the chief engineer and the captain at trial. When confronted with his prior, apparently conflicting deposition testimony at trial, each man explained that at the time of his

deposition, which was three years after the accident, he was not given an opportunity to review the barge's records to determine the work being performed on the barge at the time of the accident. Further, deposition testimony concerning the accumulations of fluid and oil on the floor and stairway resulting from the installation of a tension machine did not conflict with trial testimony about the fluid and oil-free nature of the floor and stairway on the date of the accident because the barge's records reflected that the installation of the tension machine had been completed on April 10th and the accident occurred on April 12th. The district court credited that explanation for the discrepancies between the deposition testimony of the two men and their trial testimony. The district court based its decision on its assessment of the credibility of the chief engineer, the captain and other witnesses. Determinations as to the credibility of witnesses are peculiarly within the province of the district court. Even if we were convinced, which we are not, that had we been sitting as the trier of fact, we would have weighed the evidence differently, our ability to reverse the district court's judgment on the basis that its findings of fact are clearly erroneous is extremely limited. As the Supreme Court said in *Anderson v. Bessemer City,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.* 470 U.S. at 575, 105 S.Ct. at 1513.

We conclude that the district court's finding of fact are not clearly erroneous.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED
AUG 22, 1988

JOHN A. SCHEXNIDER, ET UX	:	
	:	
VS.	:	CIVIL ACTION
	:	NO. 81-2358-LC
MCDERMOTT INTERNATIONAL, INC., ET AL	:	(Judge Veron)
	:	

FOR THE PLAINTIFF

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VERON, J.

OPINION

This controversy arises out of a seaman's slip-and-fall incident on board a derrick barge in the Java Sea off the coast of Indonesia. The seaman, John A. Schexnider seeks various elements of damages and his wife Allison Schexnider is also a plaintiff in a loss of consortium claim. Defendants as of trial were McDermott International, Inc. which was Mr. Schexnider's employer at the time of the incident, McDermott, Inc. and Insurance Company of North America (INA), the liability insurer of both defendant corporations. The matter was tried to the court sitting in admiralty on July 18 through July 21, 1988.

BACKGROUND

The plaintiff first filed his complaint on December 28, 1981 alleging that on April 12, 1981 he slipped on grease or hydraulic fluid allowed to accumulate on a step of a stairway on the Derrick Barge 21 (DB21) aboard which, as storeman, he was a crewmember. The fall was alleged to have caused serious injuries.

The claim as to Mr. Schexnider was originally styled as being under the Merchant Marine Act of 1920 (the Jones Act)[1] and the general maritime law of the United States, specifically unseaworthiness and claims related to maintenance and cure. Subsequently this court held that the plaintiff's[2] claim was governed by the law of Australia,

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1. 46 U.S.C. §688.

2 Most rulings in this case, including that of the court of appeals, see n. 4 *infra*, refer only to Mr. Schexnider's claim. Insofar as rulings concerning the applicability of the Jones Act or the general maritime law of the United States pertain to the injury, they govern Mrs. Schexnider's loss of consortium claim as well. This opinion will continue to refer to plaintiff in the singular, meaning Mr. Schexnider.

and dismissed on *forum non conveniens* grounds.[3] The plaintiff appealed, and the Fifth Circuit affirmed as to choice of law but reversed as to the *forum non conveniens* dismissal and remanded the case for trial of Mr. Schexnider's maritime claim according to Australian law.[4]

In other rulings this court has held, *inter alia*, that the claims against the McDermott defendants are within the court's admiralty and maritime jurisdiction under 28 U.S.C. §1333,[5] that the Louisiana Direct Action

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3. Ruling on Defendant's Motion to Dismiss, record document no. 155, June 23, 1986.

4. *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987). According to defense counsel, a defense petition to the Supreme Court was voluntarily dismissed after the plaintiff did not apply for writs within the delay period. However, the case is reported as *cert. denied, McDermott, Inc. v. Schexnider*, 108 S.Ct. 488 (1987).

5. Ruling on Motion to Dismiss for Lack of Subject Matter Jurisdiction, record document no. 178, May 23, 1988. The essence of the ruling is that regardless of the substantive law chosen, since the action involves a seaman's injury on shipboard on the high seas, both maritime *nexus* and *locus* are present so as to confer admiralty jurisdiction. *Accord, Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 311 (5th Cir. 1987) (choice of Singaporean law did not deprive the federal court of admiralty jurisdiction). The defendants have now re-urged their position that since Australian land-based tort law governs the slip-and-fall, the case is not maritime and therefore admiralty jurisdiction is lacking. It suffices to say that the prior jurisdictional ruling is now the law of the case. Since the ruling of May 23, 1988 the court has learned that the reason Australian land-based law governs the alleged tort is that Australia has no substantive body of maritime law. However, an Australian court would exercise maritime subject matter jurisdiction over the claim.

A couple of other matters related to jurisdiction and mode of trial should be noted here. Diversity jurisdiction is lacking since McDermott, Inc. has its principal place of business in Louisiana and the Schexniders are Louisiana citizens as well. The plaintiff had demanded jury trial at

Statute[6] applies to the actions against INA which are pendent as to claim and party,[7] and that the court lacked in personam jurisdiction over J. Ray McDermott Australia Pty., Ltd., an Australian corporation, and McDermott

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5. footnote continued.
first under the Jones Act and subsequently due to the fact that in Australia the substantive right of action is an action at law. While agreeing with defendants that, in this case under the court's admiralty jurisdiction, the plaintiff had no right to trial by jury, the court cautiously ordered a dual bench and jury trial to increase the chance of an appeal resulting in final relief. Ruling on Motion to Strike Jury Demand, record document no. 185, June 8, 1988.

In a minute entry of January 22, 1986 (record document no. 92) the court ruled that since a felony conviction of the plaintiff was over ten years old and did not bear directly on his truthfulness or untruthfulness, it would not be admissible for impeachment but would be admissible in the damages phase as a consequence of the plaintiff's failure to reveal the conviction, and his concealment of time served, on his overseas employment application. On the morning of the first day of trial the plaintiff waived the jury. At the same time he waived his objections to introduction of the old felony conviction.

6. La. Rev. Stat. 22:655 (West 1978). The statute was amended by La. Act No. 934, July 11, 1988, effective September 9, 1988 to require joinder of the insured, so the statute's popular name may become an obsolete.

7. *Schexnider v. McDermott International, Inc.*, _____ F. Supp. _____, 1988 Westlaw 70602 (W.D. La.). In post trial memoranda the defendants raise a new argument that no Direct Action may be maintained because issuance of the liability policy via the Houston insurance agency of Adams & Porter resulted in delivery in Texas. The Direct Action ruling, *id.*, is the law of the case. The court would now add only that "delivery" in La. Rev. Stat. 22:655 is with reference to the insured who ultimately receives the policy, as opposed to the insurance agent through whom liability coverage is purchased, and that the court's ruling on this issue does no violence to the Louisiana Supreme Court's decision in *Esteve v. Allstate Insurance Co.*, 351 So.2d 117 (La. 1977) where there was no holding that delivery occurred in Louisiana nor any facts to support such a holding.

Southeast Asia Pte., Ltd., a Singaporean corporation.[8] The two latter corporations are the owner and demise charterer, respectively, of the DB 21. The effect of the latter two rulings is that although the Australian and Singaporean McDermott subsidiaries would not be parties, the plaintiff would have the opportunity to litigate their fault against INA in the Direct Action subject to any applicable deductible, limit or exclusion.

McDermott International, Inc. is a Panamanian corporation which is the parent corporation of McDermott, Inc. and which now has its principal business office in New Orleans, Louisiana. In 1981 McDermott, Inc. was the parent and McDermott International, Inc. was the subsidiary. The latter then had its principal business office in Brussels, Belgium.

The parties agree that under Australian law the basic cause of action is in ordinary common law negligence, with the plaintiff bearing the burden of proof by a preponderance of the evidence. The plaintiff has also alleged a cause of action for breach of an implied warranty to provide a safe place to work based on his contract of employment with McDermott International, Inc.[9] The

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8. Ruling on Defendants' Motions to Dismiss and Motions to Strike, record document no. 223, July 15, 1988.

9. The defendants have responded to this claim on the merits, both as to choice of law and substantively. The warranty action was not asserted in this form until the Sixth Supplemental and Amended Complaint filed June 14, 1988. However, from the first filing on December 28, 1981, the plaintiff had asserted breach of the implied warranty of seaworthiness which runs in favor a seaman under American maritime law. This court's choice of Australian law was affirmed on May 29, 1987, see n. 4 *supra*, and the American maritime claims were not ordered stricken until July 15, 1988 after the last amendment of the complaint, see Ruling, n. 8 *supra*. For these reasons the court considers the defendants adequately on notice of an asserted cause of action under a warranty strict liability theory.

questions of what law would govern such a claim and whether the claim actually lies are reserved until after the findings on causation.

ANALYSIS OF FACTS

As storeman aboard the DB 21, the plaintiff occupied an indoor work space below deck. This office was at the top of the ship's ladder, or stairway, which descended eight steps or treads to a landing and then four more treads to the machine shop, adjacent to which was another supply room. On the morning of April 12, 1981 deck supervisor John Rutledge, Jr. came to the plaintiff's work station and requested a new hard hat and safety gloves. As these items were kept in the downstairs supply room, Schexnider took his keys in his right hand and started down the stairs. Rutledge followed immediately behind him.

Schexnider descended in his customary manner which was to hold onto the left handrail but not the right one, and step down with his left foot, then bring his right foot down to the same tread before stepping off again with his left foot. He did so slowly and deliberately. This one-at-a-time method is understandable since he was obese and had recently undergone back surgery which was only partially successful following removal of a spinal tumor.

Having reached the landing, Schexnider began to descend the remaining four steps in the same manner. His recollection and that of Rutledge differ as to what followed.

According to Schexnider, he started down the second flight of four treads with his left hand on the rail. Once both feet were on the first tread below the landing he stepped off again, probably with his left foot, and at that time his other foot slipped forward out from under him and his left hand

released the rail. He landed in a sitting position and bounced or scooted down the steps, coming to rest on a lower step with his feet on the floor.

According to Rutledge, the plaintiff had a good grip on the left handrail when he started down the second flight. When both feet were on the first tread, he appeared to just sit down slowly, but somewhat harder than a person would seat himself on a dining room chair. At the same time he held his right hand out, palm down, as if to catch himself, and released the left handrail. He then turned to the right and rolled, coming to rest seated on the next step, i.e., second from the landing and third from the floor, with his feet on the floor, and began shouting in pain.

The plaintiff testified that after he fell he looked at the first step and saw hydraulic fluid or an oily substance in the place where he slipped. In his deposition he described it as a pool of hydraulic fluid on the checker plate or textured sheet metal surface of the tread. However, at trial the evidence established that at the time the treads were made of expanded metal, which is sheet metal perforated and stretched out to form a grating with diamond-shaped openings. The expansion of the sheet metal causes edges to turn up where the diamond shapes intersect, thus forming a good non-skid surface with openings which would not allow foreign substances to collect, and which would scrape sand and dirt tracked from the deck through the holes to the underside of the step.

At trial the plaintiff agreed that the steps were expanded metal, but maintained that hydraulic fluid on the top step caused him to slip and fall. He attributed the presence of hydraulic fluid to ongoing installation of hydraulic pumps for a tension machine, used in the barge's pipeline-laying tasks, in the MECO room adjacent to the

landing between the flights of stairs. The MECO room was a space which also housed ocean water desalinization equipment. Installation of the tension machine pump in that location involved placement of hydraulic lines through the bulkhead of the MECO room at ceiling level and over the area of the stairway landing. However, the court finds that the tension machine installation was completed no later than April 10, 1981, two days before the accident. Leak testing was done not by filling the lines with costly hydraulic fluid, but with diesel fuel. Any leaks discovered in this fashion were eliminated before hydraulic fluid went into the lines.

Rutledge had used the steps several times previously that morning and had seen no foreign substance on them. He saw no oil, grease, hydraulic fluid or other slippery substance on the stairs upon inspecting them immediately after the accident. The plaintiff himself had used the stairs earlier that morning and had seen none. While sand or dirt could have been tracked onto the stairs from the deck, the work being done did not involve grease or oil on deck. and these would not have come to be on the stairs in this way. Sand or dirt on the stair would not have caused the plaintiff to fall. Only the plaintiff testified to an oily substance being on the stair. First Engineer George Renninger, an American, went below to check the stairs for oil shortly after the accident upon hearing reports originating with Schexnider that oil was on the step. He found none.

The stairs descended to the barge's machine shop which was under the supervision of Chief Engineer Frank Ward, an Australian. Ward had a reputation as an exceddingly meticulous taskmaster in regard to the cleanliness of his machine shop at all times. Both Rutledge and Renninger responded to the effect that it was an understatement to say that Ward's routines for cleaning the machine shop

were thorough. Renninger described Ward's helpers as cleaning the area, including the stairs, constantly from one end to the other. He testified that the policy with spills of hydraulic fluid or other oily substances was to clean them up immediately without exception because of the hazard. Rutledge testified that chains and equipment pertaining to Ward's machine shop were stored directly beneath the stairway in question, and that these were remarkably clean, based on Rutledge's not inconsiderable experience as a seaman in the oil service industry.

Ward testified that rags and sacks were provided and kept handy for wiping off boots to prevent passageways from being tracked up. When passageways became messy, work was stopped to address cleanup. He added that he went up and down the stairs around thirty times a day and never found them to be slippery, and that Schexnider used the stairs more than anyone. There was adequate lighting over the stairway at all times.

Both Schexnider and Ward testified that the treads of the stairway were slightly dented. This was due to a heavy object being dragged down the stairs to the machine shop. This condition was so unpronounced that others including Rutledge had never noticed it. From either Rutledge's or Schexnider's description of the fall, this slightly dented condition of the treads did not contribute to the accident.

Marine surveyor and Marine engineer Captain Rudy Vorenkamp testified in regard to the design of the stairway or "ship ladder." Captain Vorenkamp lived and worked for three years in Australia where he built semi-submersible rigs under constant dealing with the Australian Transport Authority. He testified that in 1981 no applicable Australian regulations addressed the angle of ladders in

machinery space or elsewhere. He noted that where, as here, the ladder is in machinery space, the arrangement of necessary machinery is the first consideration and the ladder is placed in whatever space is left over.

The deposition transcript of Walter R. Hazard, a marine engineer employed by defendant McDermott, Inc. is in evidence. The court acknowledges his expertise in the field of marine engineering and design. He stated that the angle of the stairway in question is approximately 51 degrees. The United States Coast Guard regulations, to which the Australian DB21 are not subject, allow a maximum angle of 50 degrees in machinery spaces. Under currently applicable Australian regulations a stairway may have an angle of up to 70 degrees, and in machinery spaces, up to 90 degrees, i.e., vertical.

Captain Vorenkamp observed that where a ship's ladder is between 40 and 60 degrees the user faces a dilemma whether to go down forward or to turn around and descend backward. It is a matter of personal choice. He also observed that even a ladder with considerable angle to it can become steep or vertical when the vessel rolls. From the photographs,[10] it appears that the angle of the stairs presented no unreasonable hazard to descent facing forward. All other crew members having occasion to use them did so easily in a forward position with or without using handrails. The treads were wide enough to accommodate essentially the entire length of a man's foot.

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10. The treads in the photographs are new, being made of checker plate, but the angle of the stairway is essentially the same.

CONCLUSIONS

Schexnider's method of descending the stairs, slowly, deliberately, and one at a time while holding the rail was the safest method of forward descent and would minimize any possibility that the angle of the stairs or the slight indentations in the treads would have caused the fall. The court is not persuaded that any condition of the stairs or any other appurtenance of the vessel contributed to the plaintiff's accident. Nor is the court persuaded that any foreign substance was on the stairs or played a part in causing the fall. The cause of the fall remains a puzzlement, as the court cannot discern how, after both of the plaintiff's feet were on the top step and he was, for a split second, stopped, his right foot came to fly out from under him when he stepped off with his left. The plaintiff bore the burden of proof in this action, and he has not sustained it. The court finds that no fault or condition attributable to any of the defendants or to any of INA's insureds contributed to the fall.

Accordingly, Mr. Schexnider can be awarded no recovery under either a negligence or warranty theory. Since Mrs. Schexnider's loss of consortium claim depends on the defendants having liability for her husband's injury, regardless of what law applies that claim must also be dismissed.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 22nd day of August, 1988.

/s/ Earl E. Vernon

EARL E. VERON
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 8-23-88
BY _____
TO: Pizzolatto, Jr.
Weigand, Jr.
Yoes III

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED
MAY 23, 1988

JOHN A. SCHEXNIDER	:	
	:	
VS.	:	CIVIL ACTION
	:	NO. 81-2358-LC
MCDERMOTT INTERNATIONAL, INC., ET AL	:	(Judge Veron)
	:	

RULING ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

In this matter the defendants McDermott, Inc., McDermott International, Inc., and Insurance Company of North America move this court to dismiss the claim of plaintiff John A. Schexnider for lack of subject matter jurisdiction. There is no diversity of citizenship, as the plaintiff and McDermott, Inc., are both citizens of Louisiana. An asserted claim under the Jones Act, 46 U.S.C. §688, the only colorable federal question, was invalidated when this court earlier ruled that this plaintiff's case is governed by the law of Australia. That Choice of law ruling was affirmed on appeal. *Schexnider v. McDermott*, 817 F.2d 1159 (5th Cir. 1987).

The plaintiff also alleged jurisdiction under the general maritime law. Defendants argue that because Australian law is the law of the case and it is conceded that the facts of the case do not make out a maritime claim under Australian law, this court also lacks subject matter

RECEIVED MAY 24, 1988

jurisdiction under 28 U.S.C. §1333 which confers jurisdiction over admiralty and maritime cases.

The defendants' argument is thoughtful but unvailing. In all cases, the jurisdiction of the courts of the United States is governed by the Constitution and laws of the United States regardless of what sovereignty's laws govern the substantive rights of the parties. Although certain powers are reversed to the various states under the Constitution, no state can, by its enactments, expand or contract the jurisdiction of the federal courts. *Beach v. Owens-Corning Fiberglas Corp.*, 728 F.2d 407 (4th Cir.), *cert. denied* 469 U.S. 825 (1984); *Duchek v. Jacobi*, 646 F.2d 415 (9th Cir. 1981). *A fortiori*, a foreign government, which has no power under the U. S. Constitution, cannot do so. The scope of admiralty and maritime jurisdiction under Article III and the Judiciary Act of 1789 is defined not by the laws of England and her commonwealths, nor by the rules of the continental maritime nations, but is derived from the early usages of the states and the federal laws and decisions. *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847).

The maritime jurisdiction of this court under §1333 and Federal case law interpreting that section extends to torts occurring on the navigable waters of the United States and on the "high seas," which include the territorial waters of foreign countries. In addition to maritime locality, a maritime nexus is required. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). A seaman's injury on shipboard is the most classic example of maritime nexus.

The plaintiff herein alleges an injury occurring on April 12, 1981 while serving as a crewmember of the Derrick Barge 21 which was performing work in the Java Sea off the coast of Indonesia. This case is unquestionably within the maritime jurisdiction of this court. Accordingly, the defendants' motion to dismiss for lack of subject matter jurisdiction is DENIED.

THUS DONE AND SIGNED in Lake Charles, Louisiana, this 23rd day of May, 1988.

COPY SENT
DATE 5-23-88
By Ln
To Yoes Dayle
Weigand
Pizzalotto

/s/ Earl E. Veron

EARL E. VERON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED
JUN 8, 1988

JOHN A. SCHEXNIDER	:	
	:	
VS.	:	CIVIL ACTION
	:	NO. 81-2358-LC
MCDERMOTT INTERNATIONAL, INC., ET AL	:	(Judge Veron)
	:	

RULING ON MOTION TO STRIKE JURY DEMAND

By their motion of May 25, 1988, the defendants McDermott, Inc., McDermott International, Inc., and Insurance Company of North America have moved the court to strike the plaintiff's jury demand in light of this court's ruling of May 23, 1988 in which the court held that the sole jurisdictional basis of the suit is admiralty and maritime, to the exclusion of diversity and federal question jurisdiction.

Because the motion was filed within sixty days of the July 18, 1988 trial date, it was met with an automatic notice from the Clerk of Court's office stating that motions filed within the sixty day period would be referred to the merits pursuant to Rule 2(a) of the Court's Standing Order. The provisions of the Standing Order control unless the court otherwise directs. The court entertains the present motion because by its nature it is not susceptible to referral to the merits.

This is an *in personam* suit for damages within the

RECEIVED MAY 24, 1988

admiralty and maritime jurisdiction. Because no independant basis for jurisdiction (such as diversity) exists herein, this is the kind of *in personam* maritime case which is "cognizable only in admiralty" within the meaning of F.R.C.P. Rule 9(h). As such, under F.R.C.P. Rule 38(e), jury trial is ordinarily unavailable.

The plaintiff has not responded to the present motion, but in view of the aforementioned notice from the Clerk of Court, the plaintiff's failure to respond is understandable, and it must be assumed that the motion would have been opposed. Two objections to the motion can be anticipated. The first is that trial by jury in an admiralty case, although not guaranteed, is neither forbidden. This is so. *Fitzgerald v. United States Lines Company,* 374 U.S. 16, 20; 83 S.Ct. 1646, 1650 (1963). The second is that the applicable law in this case is that of Australia, see *Schexnider v. McDermott International, Inc.,* 817 F2d 1159, 1161 (5th Cir. 1987), and that since under Australian law this would not be a maritime case but rather a land-based action at law in tort for damages for which Australian courts would afford a jury trial, the choice of Australian law entails the Australian mode of trial and therefore a jury should be provided herein.

In the courts of the United States, choice of law pertains to the substantive rights of the parties. In maritime choice of law as well as in *Erie* matters, what is substantive as opposed to procedural is a matter of federal law. Federal law holds trial by jury to be a procedural right rather than a part of the substantive remedy. *See, Powell v. Offshore Navigation, Inc.,* 644 F.2d 1063, 1068 (5th Cir. 1981) (although same substantive law applies, filing of identical claim in admiralty or diversity through saving clause effects procedural matters, the most important of which is trial by jury); *see also, Byrd v. Blue Ridge Rural Electric Cooperative, Inc.,* 356 U.S. 525, 78 S.Ct. 893 (1958) (in *Erie*

diversity case where state law provided for bench trial but such trial mode was not "bound up" with the substantive right, mode of trial was procedural and jury could be had in federal court).

There is no indication that the Australian tory scheme, which is founded on the common law of England, has any feature as applicable to this case which makes jury trial an inextricable element of the substantive right. Therefore this court agrees in principle with the defendants that the plaintiff is not entitled to trial by jury herein.

The age and history of this case, however, counsels that the court take extraordinary measures to see that the rights of all parties are finally adjudicated without delay. If the present motion were granted and the plaintiff prevailed in the jury issue on appeal a second trial would be required. This case reached trial only after one appeal, and is now six and a half years old. The prudent course is to provide the court of appeal with a record which will enable it to decide this case without remand if possible. Therefore, the court will exercise its discretion to let the case be tried to a jury and to the court simultaneously, with each rendering a decision untainted by the conclusions of the other. Accordingly, although the court holds that the plaintiff is not entitled to trial by jury herein of right, the case will be tried to a jury as well as to the court, so that the present motion of the defendants to strike the plaintiff's jury demand must be, and is hereby DENIED.

THUS DONE AND SIGNED in Lake Charles, Louisiana, this 8th day of June, 1988.

COPY SENT
DATE 6-10-88
By Donna
To
Pizzalotto, Jr.
Weigand, Jr.
Yoes III, Dayle & Woodley

/s/ Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED
JUN 14, 1988

JOHN A. SCHEXNIDER, ET UX	:	
	:	
VS.	:	CIVIL ACTION
	:	NO. 81-2358-LC
MCDERMOTT INTERNATIONAL, INC., ET AL	:	(Judge Veron)
	:	

RULING ON MOTIONS TO DISMISS AND MOTION TO STRIKE

By their motions of May 18, 1988, the defendants McDermott, Inc., McDermott International, Inc., and Insurance Company of North America (INA) seek dismissal of the captioned matter under F.R.C.P. Rule 12(b)(6) or alternatively summary judgment under Rule 56, and move to strike certain matters pursuant to Rule 12(f). The plaintiffs filed a response after the passing of the ten day deadline of Local Rule 10(f), but the present rulings would be the same whether or not the untimely response was considered.

I. *INA's Alternative Motion to Dismiss for Failure to State a Claim or for Summary Judgment*

INA challenges the right of the plaintiffs, John A. and Allison Schexnider to assert a direct action against it for the alleged negligence of the other defendants whom it insures. The pleadings suggest, although somewhat unclearly, that the plaintiffs attempt to rely on the

insurer's contracts with Louisiana for application of La. Rev. Stat. 22:655 which permits, under certain circumstances, a direct action by an injured party against a tortfeasor's liability insurer. The INA challenge aises several issues: (1) whether La. REv. Stat. 22:655 on its face applies to the facts of this case; (2) the substantive or procedural nature of the statute in this case; (3) whether this court may or should engage in a separate conflict of laws analysis for purposes of the direct action statute, where foreign law governs as between the injured party and the insured; and (4) due process considerations relative to INA. Obviously, rather than address any complex legal issues the court should first determine whether the direct action statute purports by its own terms to apply to the facts herein. The pleadings alone provide insufficient basis for such a ruling. Therefore the court will treat INA's motion as one for summary judgment and all parties shall have ten (10) days from the date of this ruling to submit materials on the issues of whether the pertinent insurance policies were issued and/or delivered in Louisiana or elsewhere. *See,* F.C.R.P. Rule 12(b).

II. *McDermott, Inc. and McDermott International, Inc.'s Motion to Dismiss*

In support of their motions to dismiss, McDermott, Inc. and McDermott International, Inc. point out that the issue of control by these McDermott companies over the Australian and Singaporean subsidiaries has been previously litigated and decided herein in regard to choice of law and *forum non convenes* issues, see *Schexnider v. McDermott International, Inc.,* 817 F.2d 1159 (5th Cir.), *cert. denied,* _____ U.S. _____, 108 S.Ct. 488 (1987). The McDermott defendants argue that since it is the law of the case that they did not exercise sufficient control over the Australian and Singaporean subsidiaries to require a choice of United States or Panamanian law rather than

Australian law, it is likewise the law of the case that they exercised insufficient control to subject them to any liability to the plaintiffs.

In its choice of law analysis this court made reference to "deposition testimony which clearly shows that the day-to-day operation of the 21 was controlled locally, i.e., by the charter McDermott Southeast Asia, Pte, Ltd., and, to a lesser extent, the vessel owner McDermott Australia, Ltd." Ruling Upon Defendants' Motion to Dismiss, p. 8 (June 23, 1986). The court of appeal acknowledged this finding. 817 F.2d at 1162.

The fact, however, that the movers did not control DB 21 day-to-day is not conclusive upon the issue of whether the movers could have any liability to the plaintiffs through a partial control or alter ego theory. It must be borne in mind that the purpose of the prior factual inquiry based on deposition testimony was to determine whether the totality of factors "weighed in favor of applying Australian law." 817 F.2d. at 1161. The Fifth Circuit has affirmed this court's conclusion that Australian law does apply. *Id.* The court takes notice that the basis of Australian jurisprudence is the common law of England, and common law rules of joint and several liability presumptively apply. Therefore the issue is not whether this court's previous finding as to control "weighs in favor" of nonliability on the movers, but whether a reasonable trier of fact could find *any* liability on the movers. The ruling of July 23, 1986, *supra*, did note that a "McDermott, Inc. marine equipment coordinator went to supervise the operation of the DB 21" on occasion. *Id.* at p. 8. Even remote supervision by one or both of the McDermott movers could give rise to liability. The Fifth Circuit has emphasized that negligence issues are rarely suited for trial on motion even where material facts are not disputed. *E.g., Davidson v. Stanadyne, Inc.*, 718 F.2d 1334, 1338 (5th

Cir. 1983). The liability of each McDermott defendant is an issue suited for the thorough factfinding processes of trial with live witnesses. Moreover, since the court has already denied defendants' motion to strike plaintiffs' demand for jury trial, such rights as the plaintiffs may have would be frustrated by disposal of the issue by motion. Therefore, the motions to dismiss of McDermott, Inc. and McDermott International, Inc. are denied.

III. *Defendants' Motion to Strike*

The defendants move under F.C.R.P. Rule 12(f) to have stricken from the pleadings all references to the Jones Act and the corollary seaman's remedies under the general maritime law of the United States as having no basis under the substantive Australian law held to apply in this case. As stated above, the law of the case is that the American substantive law has no application herein. The motion, however, coming as it does from defendants, is untimely under the rule, which provides that the court may order striking of pleadings:

> [u]pon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service upon him ...

F.R.C.P. Rule 12(f). The present motion does not precede a responsive pleading to any pleading of the plaintiffs nor does it come within twenty days of any pleading of the plaintiffs. Nor does it come within twenty days of the order of the Supreme Court denying certiorari on the choice of law issue. *See, supra,* 108 S.Ct. 488 (entered December 7, 1987).

Rule 12(f) permits the court to strike matter from a pleading *upon the court's own initiative* at any time. Several courts have interpreted that aspect of the rule to permit the district court to consider untimely motions to strike. *E.g., Lunsford v. United States,* 570 F.2d 221 (8th Cir. 1977); *Krauss v. Keibler-Thompson Corp.,* 72 F.R.D. 615 (D. Del. 1976); *Stonybrook Tenants Ass'n. v. Alpert,* 29 F.R.D. 165 (D. Conn. 1961). The Ninth Circuit, on the other hand, has held that the district court has no authority to grant an untimely motion to strike. *Culinary & Service Employees Union, Local 555 v. Hawaii Employee Benefits Administration, Inc.,* 688 F.2d 1228 (9th Cir. 1982). The Fifth Circuit has not ruled on the issue nor has any district court within this circuit.

The last thing this case needs is an unnecessary procedural impropriety. Therefore, regardless of the motion's apparent merit, the prudent course at present is to deny the motion without prejudice to the court's right to order pleadings striken if the plaintiffs persist in references to remedies which are inapplicable under the law of the case, and without prejudice to the defendants' right to re-urge the motion if developments such as further amendment of the complaint restore its timeliness under the rule.

IV. *Defendants' Alternative Motion to Dismiss*

Defendants move for dismissal of the complaint on the alternate ground that plaintiffs have alleged no specific grounds for recovery under Australian law. The plaintiffs have alleged considerable facts in their original petition, the gravamen of which is injury caused by negligent procedures of the defendants. As observed above, Australia is a common law nation. The pleadings give adequate notice of a claim founded on common law negligence. The defendants have argued previously, and this court has noted, the

presumptive adequacy of Australian law for relief of the stated claim. *See,* 817 F.2d at 1162. The alternative motion is denied.

V. *Conclusion*

For the reasons set forth hereinabove:

The alternative motion of INA for failure to state a claim upon which relief can be granted or for summary judgment is hereby CONVERTED under Rule 12(b) to a motion for summary judgment under Rule 56 and all parties shall submit all materials for consideration by the court within ten (10) days of receipt of this ruling;

The motion of McDermott, Inc. for failure to state a claim upon which relief can be granted is DENIED;

The motion of McDermott International, Inc. for failure to state a claim upon which relief can be granted is DENIED;

The motion of defendants to strike certain matters from the pleadings is DENIED WITHOUT PREJUDICE; and

The alternative motion of defendants for failure to state a claim upon which relief can be granted is DENIED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 14th day of June, 1988.

COPY SENT
DATE 6-14-88
By ln
To Yoes
Weigand
Pizzolatta

/s/ Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED
JUL 7, 1988

JOHN A. SCHEXNIDER	:	
	:	
VS.	:	CIVIL ACTION
	:	NO. 81-2358-LC
MCDERMOTT INTERNATIONAL, INC., ET AL	:	(Judge Veron)
	:	

FOR THE PLAINTIFF

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VERON, J.

MEMORANDUM RULING

In this slip and fall case of far-reaching implications, the court is called upon to decide important issues regarding the Louisiana Direct Action Statute[1] on a Motion for Summary Judgment filed by defendant Insurance Company of North America (INA).

I. BACKGROUND

The plaintiff, John A. Schexnider, is an American citizen domiciled in Lake Charles, Louisiana. He alleges an injury occurring on April 21, 1981 while serving as a crewmember of the Derrick Barge 21, an Australian flag vessel which was performing work in the Java Sea off the coast of Indonesia. Schexnider was employed at the time by Panamanian corporation McDermott International, Inc. pursuant to an employment contract entered in New Orleans on March 6, 1981 which called for him to work "in the Southeast Asia Area."

As defendants, the plaintiff has named his employer, McDermott International, Inc.; the vessel charterer, McDermott Southeast Asia, Pte., Ltd.; the vessel owner, McDermott Australia, Ltd.; the parent corporation, McDermott, Inc.; and INA as liability insurer of "all McDermott companies."

In *Schexnider v. McDermott*,[2] the Fifth Circuit affirmed this court's holding that Australian law, rather than

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[1] La. Rev. Stat. Ann. 22:655 (West 1978).

[2] 817 F.2d 1159 (5th Cir.), *cert. denied*, _____ U.S. _____, 108 S.Ct. 488 (1987).

the Jones Act, applies to the alleged tort. In the same opinion the Fifth Circuit also reversed this court's decision that the doctrine of *forum non conveniens* was applicable and remanded the case with instructions to retain jurisdiction and to apply Australian law to Schexnider's maritime claim.[3]

II. THE DIRECT ACTION CLAIM

INA advances two arguments for summary judgment in its favor. The first argument is that the Direct Action Statute does not apply on its face because the accident did not occur in Louisiana, and the liability policy was neither issued nor delivered in Louisiana. The second argument is that whether or not the statute purports to apply, this case is governed by Australian law which grants no direct action and consequently the plaintiff cannot avail himself of the Louisiana statute.

A. *Facial Application of the Direct Action Statute*

On the face of the statute creating it, the Louisiana direct action is available to a claimant when the policy was issued or delivered in Louisiana, or the accident or injury occurred in Louisiana.[4] In this case the accident and injury

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[3] 817 F.2d at 1164.

[4] The Statute provides:

> No policy or *contract of liability insurance* shall be *issued or delivered in this state*, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facia evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the

occurred in the Java Sea around the globe from Louisiana, and the INA policy was issued outside Louisiana, probably at INA's Pennsylvania headquarters. The bone of contention is whether the policy was delivered in Texas or in Louisiana. The material facts are not in dispute.

(footnote 4 continued)

> policy by the injured person, or his or her survivors mentioned in Revised Civil Code Article2315, or heirs against the insurer. *The injured person* or his or her survivors or heirs hereinabove referred to, at their option, *shall have a right of direct action against the insurer within the terms and limits of the policy;* and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. *This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such action, provided the accident or injury occurred within the State of Louisiana.* Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State.
>
> It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability insureds said insured may have as or for a tort-feasor within the terms and limits of said policy.

La. Rev. Stat. 22:655, *supra* at n.1 (emphasis added). A detailed discussion of the statute, its history and jurisprudence is found in Johnson, *The Louisiana Direct Action Statute*, 43 La. L. Rev. 1455 (1983).

The policy in question pertained to the period from April 1, 1981 to April 1, 1982. Its cover sheet gives the name of insured as being "McDermott Incorporated, et al" having a New Orleans address. It is a "standard worker's compensation and employer's liability policy" covering broadly all employees in offshore activity. The "et al" refers to one hundred and one subsidiaries, affiliates, joint ventures, divisions, branches and employee benefit plans worldwide in the McDermott, Inc. family of companies whose general headquarters is in New Orleans.

The original physical copy of the policy was initially sent to Adams & Porter Associates, Inc. of Houston, McDermott, Inc.'s longtime insurance agent. Pursuant to the instructions of J. Burns Smith, who was head of Risk Management for the entire McDermott organization in New Orleans, James P. Glotfelty of Adams & Porter sent or took the original policy to the office of Edward M. Nelson, Jr. at Hudson Engineering Corporation in Houston. Hudson Engineering is one of the McDermott subsidiaries covered by the policy.

Nelson, whose job entailed no insurance or risk matters, had been notified by Smith in New Orleans that Nelson would be receiving some McDermott liability policies for safekeeping. Pursuant to further instructions of Smith, by a letter dated July 3, 1980, Nelson promptly forwarded photocopies of the policies to McDermott's Corporate Insurance Risk Management Office in New Orleans, where they were to be used, and locked the originals in his credenza. Smith's letter explained that "it has been determined to be in the Corporation's interest to take possession of Liability-oriented insurance policies, binders, and endorsements in the Houston Offices of McDermott." A memorandum of July 21, 1982 (i.e., after thee period of the policy concerned here) from Smith to nine individuals,

including Nelson, continues this procedure and clarifies its aim, which was "that those policies having liability coverages *not* be issued or delivered in Louisiana."[5]

Smith's instructions to Glotfelty, Nelson and others were given on the advice of Arden J. Lea, corporate counsel for McDermott, Inc. Lea's purpose in giving that advice was to avoid the application of the Louisiana Direct Action Statute in those instances where the accident did not occur in Louisiana. His two primary concerns regarding the statute were prejudice to McDermott's ability to limit vessel liability under then-existing law[6] and the prospect of a *forum non conveniens* defense being defeated on the grounds that the suit, being a direct action peculiar to a few jurisdictions, could not be brought elsewhere. Therefore, he

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[5] The letter and memorandum are included as exhibits to the deposition of Nelson. The memorandum suggests that all liability coverages be certified by area risk managers who would notify Adams & Porter that all policies and endorsements for these coverages *not* be delivered in Louisiana; that Adams & Porter would retain the originals of the policies and endorsements, promptly copy them and forward the copies to McDermott, Inc.'s office of Corporate Insurance Risk Management (CIRM) in New Orleans; that Adams & Porter would deliver several times a year the accumulated originals to Nelson at Hudson Engineering in Houston; and that annually a representative from the Casualty-Property or Marine & Aviation departments at CIRM would go to Houston to review the originals and arrange files.

[6] Lea's concern was apparently for prejudice to the insurer's ability to limit liability rather than McDermott's. The Fifth Circuit had formerly held that interposition of the Limitation of Liability Act, 46 U.S.C. §§181-196, was a defense "strictly personal" to the shipowner under Louisiana law and was therefore unavailable to an insurer sued by direct action. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). That holding was overruled in *Crown Zellerback Corp. v. Ingram Industries, Inc.*, 107 S.Ct. 87 (1986) which holds valid under Louisiana law a policy provision fixing the insurer's liability at that of the insured when the latter's liability is judicially limited to the value of the vessel.

recommended to Smith and to Assistant General Counsel Frank Allen that McDermott policies be delivered to Hudson Engineering in Houston and that Babcock & Wilcox policies be delivered in that subsidiary's Barberton, Ohio office.

The plaintiff contends that under these facts the policy was, in legal effect, delivered in New Orleans, Louisiana and that the Texas "delivery" was nothing more than a hollow and ineffectual subterfuge.

Our research reveals but a single case where the "Constructive delivery" argument was made, namely *Signal Oil & Gas Co. v. Barge W-701.*[7] Ironically McDermott, as J. Ray McDermott and Company Inc., was on the other side of the argument in that case. The dispute involved an offshore pipeling rupture caused by a McDermott subcontractor. McDermott had agreed to indemnify its principals, who owned the pipeline, but the subcontractor, Williams-McWilliams Company, Inc., had not agreed to indemnify McDermott. Williams-McWilliams, the only negligent party, succeeded in limiting its liability to the $450,000 value of the tug whose anchor ruptured the pipeline. McDermott's indemnification liability was in excess of a million dollars.

At that time, limitation of liability was held a strictly personal defense unavailable to the insurer in a direct

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[7] 468 F.Supp. 802 (E.D. La. 1979), *affirmed in part, reversed in part on other grounds,* 654 F.2d 1164 (5th Cir. 1981), *cert. denied,* 455 U.S. 944 (1982). Although the record does not definitively show it, apparently Mr. Lea's superior, Mr. Allen, participated in *Signal Oil* at the district court level on McDermott's behalf.

action.[8] Williams-McWilliams had primary and first excess policies totalling $500,000 which were amenable to direct action since they had been delivered directly to that Louisiana-based company.

Williams-McWilliams was also covered, as a subsidiary of a subsidiary of Zapata Norness, by a five million dollar umprella liability policy issued and delivered to the parent corporation at its Houston headquarters and covering dozens of Zapata companies and divisions worldwide. McDermott's argument was that since the umbrella policy expressly continued the coverages of the first two Williams-McWilliams policies which were delivered in Louisiana, it too was "constructively delivered" in Louisiana. Both the district court and the court of appeal rejected the argument out of hand as having no basis in Louisiana law.[9] That holding did justice because the delivery of the umbrella policy to the parent Zapata Norness in Texas was wholly downstream in effect vis-a-vis the subsidiaries. The policy was delivered to the location from which it was procured and where it would be administered, that is, the parent corporate headquarters.

It is the reverse in the present case. Unlike the Zapata umbrella policy, the Houston delivery here was nothing other than a fiction. As soon as it was received in Houston, copies were made to be sent to and used in New Orleans at McDermott's Coprorate Insurance Risk Management Office which oversaw not only McDermott, Inc.'s claims but also the major claims against McDermott subsidiaries the world over, while the originals were locked

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[8] See note 6, *supra*.

[9] 468 F.Supp. at 816, 654 F.2d at 1175.

in a credenza and forgotten.[10] The Houston delivery here, unlike that in *Signal Oil*, was to be wholly upstream in effect, and was orchestrated specifically to avoid the Direct Action Statute despite the fact that the coverage was procured by and the policies to be used by the parent company in Louisiana.

Under Louisiana law, a transaction which is intended to have no effect between the parties is classified as an absolute simulation.[11] A decaratory action, called an action inn declaration of simulation, is allowed to third persons, typically forced heirs or creditors, whose interests are impaired by the sham.[12] Jurisdical facts (events having prescribed legal effects) deserve the same scrutiny as jurisdical acts such as contracts, when they are charades brought about solely for legal effects as to third persons and have no independant significance.

This plaintiff alleging injury by the fault of INA's insureds has standing to assert the simulation in fraud of his rights under the Direct Action Statute. So far as the evidence shows, it made no difference as between McDermott and INA whether the policy was delivered in Houston or New Orleans, That the sole purpose of the Houston charade was to defeat the rights of direct action plaintiffs

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[10] Nelson left behind, in place, whatever files existed in his office when he retired at the end of 1982. When asked to produce the policy for discovery herein, he went to the central file room at Hudson Engineering and asked for the "left over" files. He was directed to the "Nelson files" which contained the original policy.

[11] La. Civ. Code Art. 2026 (Rev. 1984).

[12] *See, e.g., Johnston v. Spears,* 459 So.2d 197 (La. App. 3rd Cir. 1984)(adopted son's attack of spurious sale to natural son); *Heirs of Wood v. Nicholls,* 33 La. Ann. 744 (1881) (administrator's improper purchase from estate through "straw man" invalidated); *see also,* Civ. Code Art. 2026, comment (c).

is clear. While there is no evidence that INA knowlingly participates in the hoax, neither is there any indication that INA placed any special reliance on this particular policy being issued through the agency in Houston which had handled McDermott's insurance requirements for some thirty-seven years and had previously delivered McDermott policies in Louisiana. For purposes of this suit the policy is deemed to have been delivered in Louisiana. Consequently, the Direct Action Statute on its face is applicable herein.

B. *Effect of Choice of Australian Law on the Direct Action*

The choice of law made by this court and again by the court of appeals pertained to whether the plaintiff has a cause of action under the Jones Act as opposed to a cuase of action under the liability laws of Australia, Panama, or some other jurisdiction. In a Louisiana direct action the only significance of the law aplicable to the underlying tort is whether or not there is liability on the assured, and in what amount.[13] In this case under the court's maritime jurisdiction the rule of *Wilburn Boat*[14] remains our guide, and the

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[13] *See, Crown Zellerbach Corp. v. Ingram Industries, Inc., supra,* 783 F.2d at 1303-04 (effect of the Direct Action Statute is to mirror in the insurer the liability of the insured under whatever liability law is applicable; *see also, Burke v. Massachusetts Bonding & Insurance Co.,* 209 La. 495, 24 So.2d 875 (1946) (direct action court could not look to Louisiana tort law to circumvent Mississippi imterspousal immunity); *Mock v. Mayrland Casualty Co.,* 6 So.2d 199 (La. App. Orl. Cir. 1942) (absence of Texas wrongful death action for negligent death occurring there prevented direct action recovery despite existence of wrongful death action in Louisiana).

[14] *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310 (1955).

insurance law of a state with substantial connexity to the policy in question will be given effect so long as it does not conflict with an established rule of admiralty.[15] The law of admiralty has a long history of coexistence with the Louisiana Direct Action Statute, and not conflicting admiralty rule has been cited to the court in this instance.

Other avenues of analysis arrive at the same destination. If the choice of law is seen as embracing the whole of Australian law including insurance law, Australian choice of law rules would also apply.[16] Australian courts employ an interest analysis similar in most respects to those of federal maritime and Louisiana law in regard to obligations surrounding contracts, whether bargained for or implied in law.[17] Accordingly, effect would be given to the Louisiana statute by virtue of the same factors which compel the conclusion that the policy was delivered in Louisiana for direct action purposes. Under the choice of law principle of *renvoi,* when the chosen law points back to forum law the search is over.[18] Due to the federalist policy of *Wilburn Boat, it makes no difference whether the Australian analysis would*

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[15] *Id.* at 313-14; *Ingersoll-Rand FInancial Corp. v. Employers Insurance of Wausau,* 771 F.2d 910, 911-12 (5th Cir. 1985), *cert. denied,* 475 U.S. 1046 (1986).

[16] *See, Restatement 2d, Conflict of Laws,* §8 and comment d. (American Law Institute 1971); *Richards v. United States,* 369 U.S. 1 (1962) ("whole law" includes choice of law rules).

[17] The affidavit of Professor James R. Crawford, Australian barrister-at-law, is in the record as Plaintiff's Exhibit 8 pursuant to Fed. R. Civ. Proc. 44.1. In it, Professor Crawford uses an interest analysis in regard to the employment contract and concludes that Australian courts would apply Louisiana law to that contract and to implied warranties arising thereunder.

[18] *See, Restatement 2d, Conflict of Laws, supra* §8(2); *Continental Casualty Co. v. Canadian Universal Insurance Co.,* 605 F.2d 1340, 1345 (5th Cir. 1979)(where pre-empting federal law points back to state law on an insurance issue, state law is applied).

indicate American maritime law or Louisiana law directly.

The direct action could also be seen as a state law claim pendent to the maritime claim. Although the *Wilburn Boat* doctrine generally obvicates the need for this analysis when insurance is at issue, pendent jurisdiction, usually associated with federal questions, is recognized in the context of admiralty.[19] The Supreme Court has characterized the direct action as a separate cause of action under Louisiana law,[20] and under the "common nucleus of operative fact" criterion of *United Mine Workers v. Gibbs,* [21] the direct action is a perfect candidate for pendent jurisdiction over a state law claim.[22]

Finally, if the direct action is seen as an action on an insurance contract,[23] there is independant admiralty jurisdiction as in all actions on marine policies.[24] Due to

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[19] *See, e.g., Austin v. Unarco Industries, Inc.,* 705 F.2d 1 (1st Cir. 1983); *Syndicate 420 at Lloyd's London v. Glacier General Assurance Co.,* 633 F.Supp. 428 (E.D. La. 1986) (pendent party); *Lingo v. Great Lakes Dredge & Dock Co.,* 638 F.Supp. 30 (E.D. N.Y. 1986); *Morse Electro Products Corp. v. S.S. Great Peace,* 437 F.Supp. 474 (D. N. J. 1977) (pendent claim).

[20] *Lumbermen's Mutual Casualty Co. v. Elbert,* 348 U.S. 48, 51 (1954).

[21] 383 U.S. 715 (1966).

[22] One Fifth Circuit Judge opined that pendent jurisdiction would not be available over a direct action claim, but that assessment was based on the now-discharged "single cause of action" test of *Hurn v. Oursler,* 289 U.S. 283 (1933). *See, Elbert v. Lumbermen's Mutual Casualty Co.,* 202 F.2d 744 (5th Cir. 1953) (Rives, J. dissenting from denial of petition for rehearing).

[23] The second paragraph of the statute is phrased in third-party beneficiary terms, see note 4, *supra.* However, this analogy is criticized as simplistic and inadequate by Professor Johnson. *See,* Johnson, *supra* at note 4, 43 La. La. Rev. at 1456 and n. 2.

[24] *Wilburn Boat, supra,* 348 U.S. 310 at 313; 1 *Benedict on Admiralty,* §242 (Matthew Bender 1985).

the public liability nature of the coverage and delivery in Louisiana, the direct action would lie.[25]

III. CONCLUSION

The plaintiff's direct action is held viable due to delivery of the liability policy in Louisiana notwithstanding the attempted Texsas delivery and the application of Australian law to the underlying tort. That being the case, the plaintiff's argument asserting the application of the Direct Action Statute by reason of a warranty allegedly arising out of the employment contract signed in New Orleans need not be addressed. INA is not entitled to summary judgment as a matter of law. Accordingly, the motion is DENIED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 7th day of July, 1988.

/s/ Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

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[25] *See, Coleman v. Jahncke Service, Inc.*, 341 F.2d 956, 960-61 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966) (Direct Action Statute applies to hull policy which was also policy of public liability insurance and is not excluded under La. Rev. Stat. Ann. 22:611.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED
JUL 15, 1988

JOHN A. SCHEXNIDER	:	
	:	
VS.	:	CIVIL ACTION
	:	NO. 81-2358-LC
MCDERMOTT INTERNATIONAL, INC., ET AL	:	(Judge Veron)
	:	

FOR THE PLAINTIFF

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VERON, J.

RULING ON DEFENDANTS' MOTIONS TO DISMISS AND MOTIONS TO STRIKE

MOTION OF THE COURT TO STRIKE

In their Sixth Supplemental and Amending Complaint, plaintiffs John and Allyson Schexnider have named as defendants J. Ray McDermott Austalia Pty., Ltd. and McDermott Southeast Asia Pte., Ltd. These new defendants move to dismiss the complaint against them under Fed. R. Civ. Proc. 12(b)(2), for lack of jurisdiction over the person, and Rule 12(b)(5), for insufficiency of service of process.

I.

Service was effected in New Orleans, Louisiana upon Peter R. Buchler, whom the defendants admit holds the offices of Assistant Secretary at both J. Ray McDermott Australia Pty., Ltd. and McDermott Southeast Asis Pte., Ltd. Fed. R. Civ. Pro. 4(d)(3) provides for service "[u]pon a domestic or foreign corporation ... by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." *Id.* The Original Practice Commentary C4-23, 28 U.S.C.A. Fed. R. Civ. Proc. 4 (West. Supp. 1988? at pp. 44-45 makes clear that the phrase "authorized by appointment or by law" modifies only "any othe agent," and that "an officer" or "a managing or general agent" need not be so authorized. Therefore service upon Assistant Secretary Buchler, an officer of each of the movers, was proper as to both of them.

Service of process alone, however, does not confer

personal jurisdiction on the court. This court may only exercise personal jurisdiction as to each defendant having the necessary minimum contacts for due process.

A federal court sitting in diversity has personal jurisdiction over a defendant only if, in addition to valid service of process, the defendant has minimum contacts with the forum state which would permit the court to exercise personnal jurisdiction in view of the defendant's Fourteenth Amendment due process rights. This is so because in a diversity case a federal district court may exercise in personam jurisdiction over a foreign defendant only if a state court could do so in the proper exercise of state law. *Masck Trucks, Inc. v. Arrow Aluminum Castings Co.*, 510 F.2d 1029, 1031 (5th Cir. 1975); *See, Colwell Realty Investments v. Triple T Inns,* 785 F.2d 1330, 1333 (5th Cir. 1986).

Similarly, in a case under the district court's federal question or admiralty jurisdiction, although the defendant's rights flow from the Fifth Amendment rather than the Fourteenth, it is contacts to the state where the district court is sitting that normally control, *See, Point Landing, Inc. v. Omni Capital International, Ltd.*, 795 F.2d 415 (5th Cir. 1986), *aff'd* _____ U.S. _____, 108 S.Ct. 404 (1987) (although federal statute provided for nationwide service of process, state long arm statute and state contacts control where service relied on state statute); *Max Daetwyler Corp. v. R. Meyer,* 762 F.2d 290 U.S. as a whole may be used only where federal statute providing for nationwide service of process is used and not where service relies on state or international law). *See, also, Omni Capital International v. Rudolph Wolff & Co., Ltd.*, _____ U.S. _____, 108 S.Ct. 404, 408-09, n.5 (1987); *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. ___, 107 S.Ct. 1026, 1033 (1987) (reserving question whether nationwide contacts can ever be used).

Neither a state long arm statute nor a federal nationwide service statute were used in this case. Rather, the plaintiffs used Rule 4's provisions for personal service on a corporate officer within the state in which the district court is sitting. Therefore, although the defendants' rights flow from the Fifth Amendment, it is their contacts with Louisiana as a geographic area within the United States which must be examined. Having done so, the court concludes that the exercise of personal jurisdiction over these defendants would violate their Fifth Amendment due process rights and therefore the plaintiffs' claims as to them must bne dismissed without prejudice.

Jurisdictional minimum contacts in a given case are assessed under one of two sets of criteria. A few contacts, or even a single contact which relates directly to the specific claim ("specific contacts") may satisfy due process. *Se, Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984). *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). On the other hand, where no such claim-related contact exists, personal jurisdiction may yet exist consonant with due process if the defendant has otherwise maintained certain minimum contacts ("general contacts") with the forum state. *See, helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

> When the cause of action does not arise from or relate to the foreign corporation's purposeful conduct within the forum state, due process requires *continuous and systematic contacts* between the State and the foreign corporation to support an exercise of "general" personal jurisdiction by that forum. ... More contact is required because the state has no direct interest in the cause of action. ...

Bearry v. Breach Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987) (citations omitted, emphasis in original).

In the present case neither the alleged negligence nor the harm occurred in Louisiana not is any other contact of these defendants with Louisiana relate to Mr. Schexnider's slip and fall aboard the Australian vessel in the Java Sea. Consequently the relatively stringent "general contacts" due process criteria would have to be satisfied before these defendants could constitutionally be haled into this court.

The allegations of fact which arguably have bearing on the due process rights of J. Ray McDermott Australia Pty., Ltd. and McDermott Southeast Asia Pte., Ltd. viv-a-vis Louisiana are: that all of the stock in these defendants is owned by the Louisiana-based McDermott companies; that McDermott, Inc. and McDermott International, Inc. controlled the subsidiary defendants through interlocking directorates; that these defendants held board meetings in New Orleans; that accounting, legal and risk management services were performed for these defendants by McDermott, Inc. in New Orleans; that insurance policies procured by Louisiana-based McDermott, Inc. covered subsidiaries including these defendants; and that the McDermott companies have a common pension and profit-sharing plan administered in New Orleans.

The defendants show by sworn testimony and affidavits that: no service was provided by one McDermott corporation to another without compensation; that intercorporation services and monies were scrupulously accounted for among the separate entities; and that neither McDermott, Inc. nor McDermott International, Inc. is a guarantor of any financial obligations of the Australian subsidiary; and that each of the subsidiary defendants controls its own day-to-day activities and operates for its own selfish interest.

Neither the Australian nor Singaporean subsidiaries have any connections, other than purely in-house McDermott connections, with Louisiana. They solict no business in Louisiana. They have no designated agent in Louisiana. Their vessels have never entered United States territorial waters, much less those of Louisiana. All of their operations take place in the eastern half of the southern hemisphere. They are not licensed or qualified to do business in Louisiana or anywhere in the U.S. They have no place of business in Louisiana. They have no employees in Louisiana, nor do they have any Louisiana employees.

Since the cause of action has no connection to Louisiana, "continuous and systematic" contacts are required. Due process requires that such contact be in the nature of outside business contacts and not merely board meetings, which could be held anywhere, or purely in-house services in the same corporate family. On the latter point, the *Burger King* case differs in that the relationship was franchisee-franchisor rather than parent-subsidiary or co-subsidiary, and more importantly, the relationship was between the parties and related directly to the cause of action. The kinds of contacts the Singaporean and Australian defendants have with Lousiana do not permit exercise of general personal jurisdiction consistent with these defendants' due process rights. Nor can, *a fortiori*, the contacts of McDermott, Inc. (the former parent corporation) or McDermott International, Inc. (the present parent corporation) be imputed to these subsidiaries, since even the contacts of subsidiaries cannot be imputed to a parent corporation. *See, Bearry v. Beech Aircraft Corp., supra; Travelers Indemnity Co. v. Calvers Fire Insurance Co.*, 798 F.2d 826 (5th Cir. 1986).

The only way such imputation could be made is if the plaintiffs could show that the corporate separateness

between the Louisisna-based McDermott entities and these subsidiaries should be disregarded. This court may not do so under the very law cited by plaintiffs, *e.g., Cannon Manufacturing Co. v. Cudahy,* 267 U.S. 333 (1925). The only factor here which fits the test for disregard of corporate separateness is that the corporations shared directions. As the plaintiffs themselves point out, no single factor controls. The great bulk of the facts and documentation offered by plaintiffs in support of disregarding the corporate entities is completely irrelevant to the determination. Absent persuasive evidence that the corporations themselves behaved so as to disregard their corporate separateness, neither can this court disregard it. On the contrary, the identity of each McDermott corporation has been quite carefully preserved. Consequently only the contacts specifically attributable to the Australian and Singaporean defendants respectfully may be considered, as they have been in the foregoing due process analysis.

II.

The defendants seek by a motion of June 28, 1988 to have stricken certain matter from the Sixth Supplemental and Amending Complaint. The motion is timely, coming within 20 days of that complaint and before answering.

The complained-of matter is paragraphs 46, 47, 54 and 55 of the Sixth Supplemental and Amended Complaint.

Paragraphs 46 and 47 pertain to extraneous suits being filed against McDermott, Inc. and McDermott International, Inc. Paragraph 54 alleges that McDermott, Inc. and McDermott International, Inc. "foresaw that litigation arising out of injuries to American seaman hired in Louisiana would be filed in the courts of Louisiana."

The fact that McDermott, Inc. and McDermott International, Inc. have been sued in Louisiana or foresaw such suits is irrelevant to any issue in this case. Neither defendant challenges the *in personam* jurisdiction of the court.

Paragraph 55 alleges facts and conclusions regarding Louisiana's interest in the outcome of the litigation. The choice of law issues herein have already been decided, and in any event, this kind of argument has no place in the pleadings. If the allegation is directed toward personal jurisdiction issues, it is still irrelevant. It is the due process rights of the defendants, and not the state's interest in the litigation, which bears on the proper exercise of personnal jurisdiction. *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 295 (1980). This is especially true in a "general contacts" case like the present one. The court agrees with the defendant that the objectionable paragraphs should be stricken.

III.

This court, in a ruling of June 14, 1988, denied without prejudice defendants' motion to strike all references to the Jones Act, 46 U.S.C. §688 and the corrollary seaman's remedies under the general maritime law of the United States as having no basis under the substantive Australian law held to apply in this case. While noting the motion's apparent substantive merit, this court denied it as untimely.

The court also noted that Fed. R. Civ. Proc. 12(f) permits the court to strike matter from a pleading upon the court's own motion at any time. The court further noted that its ruling of June 14 was to be "without prejudice to the court's right to order pleadings stricken if the plaintiffs

persist in reference to remedies which are inapplicable under the law of the case." The plaintiffs have now filed requested jury charges stating legal standards under the Jones Act and the American substantive general maritime law.

The Fifth Circuit held in *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir.); *cert. denied*, _____ U.S. _____, 108 S.Ct. 488 (1987) that the alleged tort herein is governed by the law of Australia. In its Memorandum Ruling of July 7, 1988, *Schexnider v. McDermott International, Inc.*, _____ F.Supp. _____ (W.D. La. 1988), this court held that the Australian law which was chosen was the substantive law pertaining to Mr. Schexnider's alleged slip and fall. *Id.*, slip op. p. 9. The principle of *renvoi* was discussed under an alternative analysis, but the narrow holding part IIB of the Memorandum Ruling was that neither Australian insurance law not choice of law rules were chosen, but only Australian substantive tort law, so that a Louisiana direct action was not defeated by the choice of Australian law.

Since it is the law of the case that the Jones Act and the American general maritime law do not apply herein, certain pleadings are irrelevant and extraneous and should be stricken in view of cleaning up this voluminous record. Therefore all references to claims for maintenance and cure, punitive damages, unseaworthiness or otherwise having no foundation under Australian substantive law are ordered stricken.

IV.

In conclusion, the court finds itself without *in personam* jurisdiction over the defendants J. Ray McDermott Australia Pte., Ltd. and McDermott Southeast Asia Pte.,

Ltd. and the plaintiffs' claims against them are dismissed without prejudice. Paragraphs 46,47, 54 and 55 of the plaintiffs' Sixth Supplemental and Amended Complaint are stricken at the motion of defendants as irrelevant and extraneous. All pleadings (but not jury charges) referring to causes of action under the Jones Act or the American general maritime law are ordered stricken upon the court's own motion as being irrelevant and extraneous.

IT IS SO ORDERED

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 15th day of July, 1988.

/s/ Earl E. Veron

EARL E. VERON
UNITED STATES DISTRICT JUDGE